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OCTOBER TERM 1941

315 U.S. 801

No. 812

CHRISTIAN CORPORATION, PETITIONER,

vs.

COMMONWEALTH OF VIRGINIA and THE CITY OF RICHMOND

BRIEF FOR RESPONDENTS IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

ABRAM P. STAPLES,
Attorney General for the Commonwealth of Virginia.

W. W. MARTIN,
Assistant Attorney General for the Commonwealth of Virginia.

HORACE H. EDWARDS,
City Attorney for the City of Richmond, Virginia.

HENRY R. MILLER, JR.,
Assistant City Attorney for the City of Richmond, Virginia.

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This brief is filed on behalf of respondents, Commonwealth of Virginia and the City of Richmond, in opposition to the granting of the writ of certiorari prayed for in the petition for the reason that the case presents no Federal question of substance decided by the court below not heretofore determined by this court.

OPINIONS BELOW

The Virginia Supreme Court of Appeals of Virginia did not deliver a written opinion inasmuch as it refused a writ of error to the judgment of the trial court (R. 32), which action of the court below will probably be recorded in volume 178 of the official Virginia reports. The Opinion of the judge of the trial court appears at page 30 of the Record.

GROUNDS OF JURISDICTION

Petitioner in the trial court challenged the validity of the license taxes assessed against it by the Commonwealth of Virginia and the City of Richmond pursuant to section 174 of the Tax Code of Virginia[1] (Acts of Assembly 1928, p. 111) and section 22 of Chapter 10 of the Richmond City Code 1937, respectively as being contrary to local law and in violation of the Commerce Clause of the Constitution of the United States. Both contentions were decided against petitioner by the trial court (R. 30), and a writ of error was refused by the court below (R. 32), the only error assigned in the petition to the Supreme Court of Appeals of Virginia for such writ of error being the alleged violation of the Commerce Clause (R. 3).

While petitioner does not so state, it is assumed that the petition to this court for a writ of certiorari is pursuant to section 237 of the Judicial Code, as amended.

STATEMENT OF THE CASE

Facts

Petitioner is a Virginia corporation with its only office in the State-Planters Bank Building, Richmond, Virginia (R. 9, 17, 18). It is engaged in the business of soliciting and taking written and oral orders in Virginia for the products of a number of manufacturers; such orders, taken subject to acceptance or rejection by petitioner's principal, are forwarded to the principal and, if accepted, the goods are shipped by the principal

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[1]The statute and ordinance are printed in full in an appendix hereto.

from the place of manufacture direct to the purchaser in Virginia,[2] the principal attending to all matters in connection with shipping, invoicing and collecting; for its services petitioner is paid at the end of each month a commission on all orders accepted by its principals (R. 11-13, 19-22).

Petitioner's principals in 1939 and 1940 were, with one exception, non-residents of Virginia and during those years, with one exception, all shipments were made from without Virginia to purchasers in Virginia (R. 11, 12, 16, 17). Prior to 1939 petitioner sometimes represented Virginia principals (R. 23), and being in business "to make money" will represent any Virginia principals whose business is profitable (R. 22). Petitioner is an independent agent, not an employee of any of its principals, and it may take on such new principals and drop such old ones as it sees fit (R. 23-24).

Petitioner's business is conducted through its Richmond office where all its records are kept including copies of the orders taken by it and confirmations thereof, and of invoices sent out by its principals (R. 17, 19-22, 24).

In April, 1940, petitioner was assessed with and paid a State license tax of $175.90 for that year as a commission merchant under section 174 of the Tax Code (R. 7, 14, 15). In July, 1940, petitioner was assessed with (but has not paid) a Richmond City license tax, including penalty, of $118.21 for that year as a sales agent under section 22 of Chapter 10 of the Richmond

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[2]A few shipments are made to North Carolina purchasers (R. 18, 19), but petitioner makes no point of the fact (R. 1, 6, 9; Petition 2; Petitioner's Brief 14). The case has been treated throughout as if Virginia purchasers only were involved. Indeed it is stipulated that the *amount* of the tax is correct (R. 14).

City Code 1937 (R. 9, 15, 25). The statute and ordinance involved each impose for any year a graduated tax (with a prescribed minimum) based upon the amount of commissions received during the preceding year. There is no controversy as to the amount of the tax (R. 14).

Question Presented

In the trial court petitioner contended, in addition to the alleged violation of the Commerce Clause, that it was not carrying on the business of a commission merchant as that business is defined in section 174 of the Tax Code of Virginia and thus was not subject to the license tax imposed by the section (R. 7).[3] This contention was decided against petitioner (R. 30), and the action of the trial court was not assigned as error in the petition to the court below for a writ of error (R. 3), nor, of course, is it urged here. The sole question here presented is the allegation of petitioner that the State and City license taxes involved "deprive it of a right to which it is entitled under the Commerce Clause of the Constitution of the United States." Petition, p. 10.

SUMMARY OF ARGUMENT

The challenged non-discriminatory State and City license taxes, which cannot be repeated in form or substance in or by other States, laid upon the purely local activities of petitioner in negotiating for its principals sales to Virginia buyers are not inconsistent with the

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[3]Petitioner did not contend that it was not a sales agent within the meaning of the city ordinance. (R. 9.)

power of the Congress to regulate commerce among the several States.

Western Live Stock v. *Bureau of Revenue,* 303 U. S. 250 (1938).

McGoldrick v. *Berwind-White Coal Mining Co.,* 309 U. S. 33 (1940).

McGoldrick v *Felt & Tarrant Mfg. Co.,* 309 U. S. 70 (1940).

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American Manufacturing Co. v. *St. Louis,* 250 U. S. 459 (1919).

Ficklen v. *Shelby County Taxing Dist.,* 145 U. S. 1 (1892).

Woodruff v. *Parham,* 8 Wall. 123 (1869).

State v. *Stein,* 240 Ala. 324 (1941); Certiorari denied, 313 U. S. 562 (1941).

ARGUMENT

Petitioner is engaged in business not as an employee, but as an independent agent, representing such principals as it elects, in soliciting orders on commission for such principals from Virginia purchasers. Petitioner's only office or place of business is in Richmond, Virginia, and while its principals in 1939 and 1940, with one exception, were located without Virginia, petitioner had nothing to do with accepting or rejecting such orders nor with shipping the goods in interstate commerce to Virginia nor with invoicing or collecting for

them. The activities of petitioner begin and end in Virginia and all the events upon which the taxes are conditioned take place in Virginia. The taxes are not subject to the objection raised against taxes imposed upon gross receipts from interstate transportation of goods, nor can they in form or substance be imposed in or by any other State so as to result in an additional burden upon the interstate distribution of manufactured products. While the taxed activities may cause or result in interstate commerce, the taxes in no way discriminate against such commerce, nor are they of such a nature as may be used as "an instrument of discrimination against interstate or foreign commerce."

It is submitted that the cases heretofore cited, notably *McGoldrick* v. *Berwind-White Coal Mining Co., supra, Western Live Stock* v. *Bureau of Revenue, supra,* and *Graybar Electric Co.* v. *Curry, supra,* make it abundantly clear that the taxes above described do not impose a prohibited burden upon interstate commerce.

While not alleging that any other State may duplicate the challenged taxes, petitioner asserts that by virtue of section 296 of the Tax Code of Virginia (Acts of Assembly 1928, p. 186), it might be subjected to multiple local taxation by each of the cities and towns of the State "if he undertook to carry on his business in all parts of the Commonwealth as he clearly has a right to do." (Petitioner's Brief, pp. 28-30.) The record does not show that any other locality in Virginia has taxed petitioner's business, nor is its prediction of potential multiple local taxation supported by section 296 of the Tax Code. This section (quoted in full in petitioner's brief, pp. 28, 29) provides in effect that a city or town may require a license for the carrying on of a business therein where a State license is required

for such business. But a State license as a commission merchant is only required where such merchant has established a definite place of business, section 131 of the Tax Code of Virginia (Acts of Assembly 1928, p. 97) providing that "every license granting authority to engage in * * any business * * shall designate the place of such business * * at some specified house or other definite place within the county or city * *." There is no State license required of an itinerant solicitor of orders in a city or town with no place of business therein (such as a drummer) and consequently section 296 of the Tax Code does not afford any authority for the assessment of a local license in such a case. Therefore, since petitioner has no place of business in Virginia except in Richmond (R. 17, 24), no other locality in the State can require it to secure a local license for soliciting orders therein or as a commission merchant under the authority of section 296 of the Tax Code of Virginia. Of course, if petitioner established an office in another city or town in the State, such city or town could impose a license tax on the business of that office, but even then there would be no duplication of tax, for the tax would be measured by the commissions on the business of that office, not including the commissions on the business of the Richmond office. Petitioner's assertion of potential multiple taxation is absolutely without support either in fact or law.

Petitioner's principal reliance (Petitioner's Brief, pp. 17-25) seems to be in *Stockard* v. *Morgan*, 185 U. S. 27 (1902) wherein this court struck down *fixed sum* State and local Tennessee license taxes imposed on a merchandise broker whose method of doing business was substantially the same as petitioner's except in one important respect. Without attempting to appraise the

present day vitality of the authority of *Stockard* v. *Morgan, supra,* it is pointed out that in that case the broker dealt only with non-resident principals and, as the opinion said, "did not represent or assume to represent any residents of the State of Tennessee * *", a fact which was the principal ground for distinguishing the case from *Ficklen* v. *Shelby County Taxing District,* 145 U. S. 1 (1892), wherein the validity of a local Tennessee license tax on a merchandise broker doing practically the same business as dsecribed in *Stockard* v. *Morgan, supra,* was sustained, except that Ficklen, while his principals happened to be non-residents in the year involved, held himself out to do a general commission business for both resident and non-resident principals. And so with petitioner here, while its principals were, with one exception, non-residents in 1939 and 1940, this has not always been the case and it will represent any principal, resident or non-resident, whose business is profitable, and the petitioner consequently needs and is liable for the unrestricted license granted under the statute and ordinance here involved. It is clear, therefore, that under the facts present the *Ficklen* case, and not that of *Stockard* v. *Morgan, supra,* controls.

Finally, reference is made to the case of *State* v. *Stein,* 240 Ala. 324 (1941), wherein writ of certiorari was denied by this court on April 7, 1941. *Stein* v. *State,* 313 U. S. 562. In that case Stein was assessed with an Alabama State license tax as a merchandise broker or commission merchant for doing business (almost identical with petitioner's) described by the Alabama court (page 325 of 240 Alabama Reports) as follows:

> "Stating generally the effect of the agreed statement of facts, it will be noted that Stein

> has been engaged in the brokerage business in the City of Mobile since October, 1937, under the firm name or style of 'Stein Brokerage Company, Merchandise Broker.' Stein negotiated contracts with *bona fide* wholesale grocers, with certain definite principals, all of whom have their place of business without the State of Alabama. Stein represented only such principals as were satisfactory to him, and for his services received a commission based on the sale price of goods purchased, which said commission was remitted at the conclusion of each month for business done during that month by said Stein in the City of Mobile, Alabama."

The Alabama court, relying upon *Western Live Stock* v. *Bureau, supra; McGoldrick* v. *Berwind-White Coal Mining Co., supra,* and *Graybar Electric Co.* v. *Curry, supra,* sustained the tax and the Federal question presented on the petition for certiorari to this court was precisely that now presented by petitioner. Although the opinion of the Alabama court does not disclose that Stein held himself out to represent any resident principals, as does petitioner here, yet a writ of ceritorari was denied as above stated.

CONCLUSION

For the reasons stated it is submitted that petitioner does not present a case wherein the court below has decided a Federal question of substance contrary to the applicable decisions of this court, but on the contrary the only Federal question presented has been decided by

the State court in line with the decisions of this court, and that, therefore, the petition for a writ of certiorari in this case should be denied.

ABRAM P. STAPLES,
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